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No. 03-972

Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY J. PAPPAS,

Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF

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I. Respondents' Reliance On Purported Blight Findings That Do Not Pertain To The Pappas Family Property Or Adjacent Properties Merely Frames The Important Questions Presented By The Decision Below Concerning What Constitutes, And Who Determines, "Public Use."

Respondents attempt to avoid this Court's review by hiding this economic redevelopment taking behind purported "findings" of blight made by the City Council, acting as respondent Agency. This attempt fails for several reasons, the first and foremost being that those findings do not relate to the Pappas Family property, or to the block on which the Pappas Family property sits, or to any of the blocks surrounding the block on which the Pappas Family property sits. No link exists between those purported findings and the taking of the Pappas Family property – they are separated by seven years in time and by an undisclosed but significant geographical distance.

Respondents argue generally that blight existed "in the downtown redevelopment area." Opp. at 10. But they cannot seriously contend that blight existed on the Pappas Family property, or on its block, or on the blocks surrounding it (some of which are occupied by respondent LLC's casinos) because the Agency's own survey in the record below and the rulings of the courts below establish beyond any question the absence of blight in the immediate area of the Pappas Family property. For example, the trial court found:

> It was not until November 19, 1985, weeks after the resolution of necessity, that the City had its employees conduct block surveys of the targeted area to determine the overall conditions in the target area. Moreover, none of the block surveys completed by the City, and submitted to this Court, indicate any findings of blight.

Pet. App. at 47a. Further, the trial court found that respondents "did not produce one report that showed that the block upon which the Pappas property is situated was ever surveyed, let alone blighted . . . and the property directly surrounding the Pappas block were hotels that the survey described as 'major hotels. O.K.'" *Id.* at 80a. Thus, the trial court concluded that the Respondents' blight findings were "unreliable" and "arbitrary." *Id.*

The Nevada Supreme Court likewise did not conclude that the Pappas Family property or the property adjacent to it was blighted. Indeed, the majority opinion did not take issue with the description of the Pappas Family property in Justice Leavitt's dissent:

> The Pappases' property was not a slum. The City's survey gave no indication that the property was blighted in any way. There certainly were no conditions injurious to the public health, safety, morals and welfare. The property was adjacent to a savings and loan building and across the street from a bank.

Id. at 31a.

Rather, informed by its reading of *Berman v. Parker*, 348 U.S. 26 (1954), that the condemning authority's determination of public use is "'well-nigh conclusive,'" Pet. App. at 2a, and by its reading of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), that courts must defer unless that authority's findings "involve an impossibility," Pet. App. at 14a-15a, the Nevada Supreme Court held that the trial court had not given sufficient deference to the respondent Agency's findings of blight, *id.* at 22a.

But this merely frames squarely the question whether the Fifth Amendment permits such judicial abdication to a local condemning authority's decision to take non-blighted property from one private citizen and give it to another. *See* Pet. at 19-30, citing, *inter alia*, *Dolan v. City of Tigard*, 512 U.S. 374, 391-92 (1994); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972); *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874). This Court should take this case to answer that question.

II. Although Respondents Dispute The Existence Of A Conflict, Their Own Arguments Establish That A Conflict Exists.

Unable to dispute the absence of blight on the condemned block in which the Pappas Family property sits, respondents cite *Berman* for the proposition "that whether or not blight exists on a particular parcel of land within an otherwise blighted redevelopment area is irrelevant to the question of whether a taking of that parcel is constitutional." Opp. at 11. This is precisely the argument raised by the condemning authority in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002) ("*SWIDA*"). The *SWIDA* case is almost identical to this one, except that in *SWIDA* a racetrack corporation, rather than a casino cartel, obtained a next door neighbor's non-blighted property for a parking lot through condemnation justified by blight elsewhere in the area. Indeed, in language almost identical to that used by respondents here, the Development Authority in *SWIDA* also attempted to support its taking of non-blighted property by arguing, based on *Berman*: "the fact that a given parcel is not blighted is not relevant where there is a purpose to eliminate blight in the area . . . ." *SWIDA*

Appellant's Br. at 28.

This case and *SWIDA* are factually the opposite of *Berman*. In *Berman*, one operating business located in the midst of terrible blight was taken along with all the surrounding blighted properties as a part of "integrated plans," 348 U.S. at 35, to rid the District of Columbia of that blight. In contrast, *SWIDA* and this case each involved a narrowly-focused taking *only* of valuable non-blighted property for the claimed purpose of remedying distant, unspecified blight; the supposedly blighted properties are not even identified, much less condemned.[1]

The Illinois Supreme Court soundly rejected the argument that nonblighted property may be taken so long as blight exists somewhere in the vicinity: "While we do not deny that this expansion in revenue [from the racetrack's use of the condemned property] could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government." 768 N.E.2d at 10-11.

In sharp contrast, the Nevada Supreme Court credited the argument advanced by both the Development Authority in *SWIDA* and the Agency here, upholding the taking as constitutional because "the Pappases failed to establish that downtown Las Vegas [*not* their own property or even the surrounding blocks] no longer suffered from physical, social, or economic blight at the time of the eminent domain

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[1] *Berman* provides no more support for this taking of only non-blighted property than *Midkiff* provides support for taking properties from small businesses and handing them over to the oligopolistic cartel of casinos that already owns most of downtown Las Vegas.

proceedings." Pet. App. at 24a. In Nevada, therefore, the owner of nonblighted property cannot stop a condemning authority from taking his property and giving it to his wealthier next door neighbor without proving that his city is free of social ills.

That Nevada and Illinois are at crossed swords over the public use protection of the Fifth Amendment's Takings Clause cannot be gainsaid.[2] This Court should take this case to resolve this stark conflict.

III. Matters Of State Law Provide No Reason To Deny This Petition.

A. The Pappas Family Did Not Delay In Raising The Issues Set Forth In Their Petition.

Respondents complain that the Pappas Family delayed in raising their challenges to the taking until "the parking garage had already been constructed." Opp. at 7. They overlook the fact that respondent Agency served the widowed Mrs. Pappas pleadings that failed to provide adequate notice of its motion for possession, and then seized the opportunity at the *ex parte* hearing (before a judge who had an interest in seeing the taking succeed) to misrepresent that the Pappases did not object to the turnover of possession, so that the Pappases' building was demolished before they could react. *See* Pet. App. at 58a-61a.

More important, respondents presented their waiver and estoppel arguments in the state courts below. The Nevada courts rejected those state law arguments and addressed the federal constitutional issues on the merits. *Id.* at 11a-12a.

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[2] *See* Motion for Leave To File Brief of *Amici Curiae* Paul and Laurel A. Moldon at 8-13 (demonstrating that this conflict is "just the tip of the iceberg").

Respondents also complain that "the Pappases raise for the first time in their petition to this Court the claim that *Berman* and *Midkiff* should be reconsidered and that a heightened level of scrutiny should be applied to takings under the Fifth and Fourteenth Amendments." Opp. at 7-8. Of course the Nevada courts can neither reconsider this Court's decisions nor select the standards for evaluating federal constitutional claims. Nevertheless, the Pappas Brief to the Nevada Supreme Court included a lengthy section entitled "This Court Should Reexamine And Limit The Applicability Of Iacometti and Berman," Respondents' Answering Br. at 27-32,[3] and another section arguing against broad judicial deference to the Agency's determination, entitled "There Was No Error In Not Deferring To The Agency's 'Interpretation,'" *id.* at 55-56. Consequently, this argument is also meritless.

B. The Nevada Statutes Do Not Insulate This Taking From Constitutional Challenge Or From This Court's Review.

Respondents place great weight on the enactment by the Nevada legislature of Nev. Rev. Stat. Chapter 279, which respondent Agency invoked in condemning the Pappas Family property. Opp. at 4, 8-9, 12. But compliance with that statute does not insulate this taking from federal constitutional challenge. The Nevada Supreme Court recognized that fact, and the fact that the Pappases were advancing just such a challenge. Consequently, the Nevada Supreme Court squarely addressed the question whether this taking violated the United States Constitution and held that it did not. *See* Pet. App. at

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[3]"Berman" refers to this Court's decision in *Berman v. Parker*, and "Iacometti" to *Urban Renewal Agency of City of Reno v. Iacometti*, 379 P.2d 466 (Nev. 1963), which relies on *Berman*.

29a.

Respondents further contend that the Nevada Supreme Court was correct in deferring to the Nevada legislature because the legislature is the "voice of the public" and "is uniquely suited to make determinations as to the best interests of the community it serves." Opp. at 12. But the Nevada legislature did not conduct this taking; the Las Vegas City Council did. The Las Vegas casinos who received the Pappas Family property have considerable political clout there – they gave so many campaign contributions locally that this case caused a "chain reaction" of recusals by judges in Las Vegas. *See City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1060 (Nev. 2000).[4]

The Fifth Amendment exists to protect individual property owners from the depredations of popularly elected government. As this Court stated, a government that holds "the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." *Citizens' Savings & Loan Ass'n*, 87 U.S. (20 Wall.) at 662. The popularity of this taking among City Council members is no gauge of its constitutionality.

CONCLUSION

The Las Vegas City Council, acting as respondent Agency,

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[4]As George Bernard Shaw observed, "A government which robs Peter to pay Paul can always depend upon the support of Paul." *Everybody's Political What's What?* Chap. 30 (1944), *quoted in The Columbia World of Quotations* #53527 (1996).

took a single city block of properties that were neither blighted nor adjacent to blight from small business owners and gave that block to a cartel of the wealthiest and most powerful property owners in Las Vegas. The expressed purpose of this taking was to remedy blight elsewhere in the downtown area. This taking finds no support in the direct holdings of *Berman* and *Midkiff*, the facts of which differ from this case like night and day. Rather, this case presents a quintessential "economic redevelopment" taking – a taking not to clear slums, but to provide, in the words of the Nevada Supreme Court, "an anchor for revitalization of the entire downtown." Pet. App. at 19a.

There is no question that economic redevelopment takings have reached "pandemic" proportions across this country. *See* Motion for Leave To File Brief of *Amici Curiae* Paul and Laurel A. Moldon at 5-8 & n.2. There are, however, very serious questions concerning whether *Berman* and *Midkiff* can be read to support such a taking and, if so, whether those cases must be reconsidered and limited, because the Public Use limitation in the Takings Clause of the Fifth Amendment to the United States Constitution does not permit such takings.

This Court should grant this Petition, issue the Writ of Certiorari, and address these questions now.

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February 17, 2004